

REMARKS

Claims 35-66 are pending.

Claims 35-66 are subject to a restriction requirement.

Claims 37-39 are provisionally elected.

Per the Examiner's restriction required in the Office Action dated 9/10/03, Applicants provisionally elect claims 37-39. The Examiner identified these claims as "Group II" claims "drawn to an atmosphere for a CVD process, classified in class 118, subclass 719."

Applicants traverse the restriction requirement, however. Applicants note that the Examiner has attempted to articulate several invention groups (I-IV), species (A-B, E, H-K), sub-species (C,F,G), and a sub-sub specie (D) that appear to result in at least 84 patentably distinct species.

Given the Federal Circuit's admonition that unclaimed subject matter is dedicated to the public, Applicants are forced to ensure that all distinct embodiments are claimed. (*See Johnson & Johnston Assoc. v. R.E. Service Co.*, 285 F.3d 1046, 62 U.S.P.Q.2d 1225, 1229, 1230 (Fed. Cir. 2002); *Maxwell v. J. Baker Inc.*, 86 F.3d 1098, 39 U.S.P.Q.2d 1001, 1006 (Fed. Cir. 1996).) Thus, under the Examiner's current restriction, Applicants would be forced to file 83 divisional applications. Under the fee structure for fiscal year 2004, the cost would be at least \$63,910 (\$770 x 83). This is in addition to the fees incurred for the current application. Applicants contend that such a result is unduly cost prohibitive and would result in inefficient prosecution for the PTO.

Applicants also note that there are only 32 claims pending, only 11 of which are independent. Applicants further note that the Specification is only 15.5 pages, comprising only 44 paragraphs. Moreover, the detailed description is less than 10 pages long, spanning only 22 paragraphs ([0023]-[0044]). Applicants contend that the Examiner's finding more patentably distinct species than there are (1) independent claims (or even total claims) or (2) pages and paragraphs of detailed description (or even the entire specification) represents an abuse of discretion.

Applicants further note that, while restriction-worthy inventions are patentable over each other, each distinct invention "may" be unpatentable because of prior art. (§802.01 MPEP). It

follows, however, that the Examiner's statements concerning patentable distinctions "may" refute the Examiner's later attempts at rejection. Specifically, if the Examiner attempts to cite art directed to one species and apply that art against another species, such an act would contradict the Examiner's statements in the Office Action dated 9/10/03 concerning patentable distinctions. Hence, Applicants may interpret the Examiner's act as either (1) an admission that the rejection is improper; or (2) an admission that the restriction was improper and an invitation to reinstate non-elected claims.

Conclusion

In light of the above remarks, Applicants request reconsideration of the Examiner's restriction requirement. Applicants further submit that the claims -- whether provisionally elected or not -- are allowable. Therefore, Applicants respectfully request allowance of all of the pending claims. If there are any matters which may be resolved or clarified through a telephone interview, the Examiner is requested to contact Applicants' undersigned attorney at the number indicated.

Respectfully submitted.



Dated 10/2/03

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